United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

FOR MR. JUSTICE VAN ORSDEL.

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

JANUARY TERM, 1909.

No. 1968 6 11

No. 5, SPECIAL CALENDAR.

HARRY T. HALL, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 24, 1908.

Court of Appeals, District of Columbia

JANUARY TERM, 1909.

No. 1968.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1908.

e.g.

In the Court of Appeals of the District of Columbia.

No. 1968.

HARRY T. HALL, Plaintiff in Error,
vs.
DISTRICT OF COLUMBIA.

a No. 329,300.

In the Police Court of the District of Columbia, November Term, 1908.

DISTRICT OF COLUMBIA
vs.
HARRY T. HALL.

Information for Violation of Police Regulations.

Be it remembered, That in the Police Court of the District of Columbia, at the City of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 (*Information.*)

In the Police Court of the District of Columbia, November Term, A. D. 1908.

THE DISTRICT OF COLUMBIA, *ss:*

James L. Pugh, Jr., Esq., Assistant Corporation Counsel, who for the District of Columbia prosecutes in his proper person, comes here into Court, and causes the Court to be informed, and complains that Harry T. Hall, late of the County of Washington and District of Columbia aforesaid, on the 3rd day of November in the year A. D. nineteen hundred and eight, in the District aforesaid, and in the City of Washington, on 14th street, northwest, then and there having a street car in motion on said day, did so propel said street car, as aforesaid, as to collide with other vehicles, contrary to and in violation of the Police Regulations of the District of Columbia, and constituting a law of the District of Columbia.

(Signed) JAMES L. PUGH, JR.,
Assistant Corporation Counsel.

Personally appeared Robert L. Middleton, this 6th day of November, A. D. 1908, and made oath before me that the facts set forth in the foregoing information upon personal knowledge are true, and that the facts set forth therein as on information and belief he believes to be true.

[Seal Police Court of District of Columbia.]

(Signed) H. C. HOPKINS,
Deputy Clerk Police Court of the District of Columbia.

Endorsed: Filed Nov. 6, 1908. F. A. Sebring, Clerk, Police Court, D. C.

2 In the Police Court of the District of Columbia.

No. 329,300.

DISTRICT OF COLUMBIA
v.
HARRY T. HALL.

Now comes G. Thomas Dunlop, Counsel for the Defendant in the above-entitled cause and enters his appearance specially herein, and on behalf of said defendant says by way of plea to the Information filed herein that this Court is without jurisdiction in the premises and moves the Court to quash the said Information for the reason that the said Court is without jurisdiction and for further reason that the Police Regulations upon which the said Information is founded is invalid as being without authority of law and as having been superseded by *and* Act of Congress approved May 23, 1908 which is inconsistent therewith.

(Signed) G. THOS. DUNLOP,
Attorney for Defendant.

Endorsed: Filed Nov. 9, 1908. F. A. Sebring, Clerk, Police Court, D. C.

3 Filed Nov. 11, 1908. F. A. Sebring, Clerk Police Court, D. C.

In the Police Court of the District of Columbia.

No. 329,300.

THE DISTRICT OF COLUMBIA
vs.
HARRY T. HALL.

Bill of Exceptions.

Be it remembered that this cause came on for hearing on the ninth day of November, A. D. 1908, before the Honorable Ivory G. Kim-

ball, one of the Judges of the Police Court of the District of Columbia, and that G. Thomas Dunlop thereupon entered his appearance as counsel for the said defendant, specially, for the purpose of pleading to the jurisdiction of this court; that thereupon said counsel for said defendant moved the court that the information charging the defendant, as a motorman of a street-car, with colliding with another vehicle in violation of a certain police regulation, be quashed, on the ground that the Police Court is without jurisdiction in the matter; that the said Police Regulation, being Section 10 of Article 10 of the Police Regulations of the District of Columbia, as amended, is invalid so far as it applies to street-cars, it being in conflict with, repealed and superseded by the Act of Congress approved May 23, 1908, entitled "An Act authorizing certain extensions to be made of the lines of the Anacostia and Potomac River Railroad Company, the Washington Railway and Electric Company, the City and Suburban Railway of Washington, and the Capital Traction Com-
4 pany, in the District of Columbia, and for other purposes," which Act conferred upon the Interstate Commerce Commission exclusive jurisdiction over the operation of street-cars in the District of Columbia, Sections 16 and 17 of which Act are in words and figures as follows, to wit:

"SEC. 16. That every street railroad company or corporation owning, controlling, leasing or operating one or more street railroads within the District of Columbia shall on each and all of its railroads supply and operate a sufficient number of cars, clean, sanitary, in good repair, with proper and safe power, equipment, appliances and service, comfortable and convenient, and so operate the same as to give expeditious passage, not to exceed fifteen miles per hour within the city limits or twenty miles per hour in the suburbs, to all persons desirous of the use of said cars, without crowding said cars. The Interstate Commerce Commission is hereby given power to require and compel obedience to all of the provisions of this section, and to make, alter, amend and enforce all needful rules and regulations to secure said obedience; and said Commission is given power to make all such orders and regulations necessary to the exercise of the powers herein granted to it as may be reasonable and proper; and such railroad companies or corporations, their officers and employees, are hereby required to obey all the provisions of this section, and such regulations and orders as may be made by said Commission. Any such company or corporation, or its officers or employees, violating any provision of this section, or any of the said orders or regu-
5 lations made by said Commission, or permitting such violation, shall be punished by a fine of not more than one thousand dollars. And each day of failure or neglect on the part of such company or corporation, its officers or employees, to obey each and all of the provisions and requirements of this section, or the orders and regulations of the Commission made thereunder, shall be regarded as a separate offense.

"SEC. 17. That prosecutions for violations of any of the provisions of this Act shall be on information of the Interstate Commerce Commission filed in the police court by or on behalf of the Commission."

And further, that the Commissioners of the District of Columbia are without authority to enact or enforce any regulation concerning the operation of street-cars in the District of Columbia, and especially the regulation in question; and further, that the said regulation is invalid because it is in violation of and — conflict with the Act of Congress approved May 17, 1862, entitled "An Act to incorporate the Washington and Georgetown Railroad Company," which provides at Section 18 thereof: "That the said company shall have at all times the free and uninterrupted use of their roadway, and if any person or persons shall wilfully and unnecessarily obstruct or impede the passage on or over said railway, or any part thereof," etc., "they shall be subjected to a penalty," etc.; and further, because said Section 18 of said statute conferred upon the car operated by said defendant the right of way over all other vehicles in the streets; and

6 further, because Section 15 of Article X of the Police Regulations of the District of Columbia expressly provides that street-cars in the District of Columbia shall have the right-of-way over all other vehicles except those of the Fire, Police, Water and Health Departments and Hospital ambulances; that thereupon the Court overruled each and every of the said motions and refused to quash the said information, to which said ruling of the Court the defendant by his counsel excepted, which said exception was duly noted by the Court on his minutes.

And thereupon the defendant entered a plea of "Not guilty." Whereupon the District of Columbia, to maintain the issue on its part joined, produced as witnesses Robert L. Middleton, J. Milton Waldron, Daniel E. Wiseman, William H. Nelson, Christopher C. Lathers, and Lloyd Champ, who, being sworn according to law, gave testimony tending to prove that a car of the Capital Traction Company which had been disabled and which was "dead," and which was being pushed by another car of said Company northward, at or near Thomas Circle in the District of Columbia, collided with a hearse which formed a part of a funeral procession, and which was preceded by four carriages, all of which were moving in a north-easterly direction and across the north-bound track of the Capital Traction Company, on the north side of Thomas Circle.

The District of Columbia, to further maintain the issue on its part joined, then produced as a witness one Alexander D. Shaner, who being duly sworn according to law, testified that he was at the time alleged in said information, and still is, a motorman employed by the Capital Traction Company and that upon the occasion in question

7 he was in charge of the front car, the "dead" car, which was being pushed; that his plow was turned out; that his car had no power at all, was perfectly "dead;" that he had no control over the car except that he could put on the brake; that the defendant Hall was in charge of the car in the rear, which was pushing; that he, Shaner, when he saw the funeral, gave a signal by pulling three bells on the conductor's gong, to the man in the rear to stop; that he first saw the funeral procession and gave said signal when the front of his car was about sixty feet from the funeral procession;

that he saw the hearse which was struck first, and that it was then twenty-five or thirty feet from the track; that there was nothing to prevent the driver of the hearse from seeing the car; that he put on his brakes but was unable to stop the car, and that it collided with the hearse.

This was all the testimony on behalf of the District of Columbia, and thereupon the District rested.

Whereupon, the defendant, being first duly sworn according to law, testified in his own behalf, that on the occasion in question he was operating the second car, which was pushing the "dead" car ahead; that he did not see the hearse until the car had struck it; that the car ahead of him, which he was pushing, was crowded with passengers; that they were on the rear platform as thick as they could stand, and swinging on the steps, and that he had no way of seeing ahead at all unless he had gone to the edge of the car and looked around; that the cars were on a curve; that he could not see through the front car; that the rear end of the front car as it rounded the
8 curve swung out toward his right hand and obstructed the view to the right; that the front end of the front car, on rounding the curve, swung to the left and obstructed his view in that direction; that he heard no signal from the motorman of the front car; that when he saw the hearse emerge from the front of the car he cut off his current and stopped the car almost immediately; that he put on his brake and just went a few feet, somewhere from four to six feet; that there was a crowd of young men talking and laughing on the back platform of the front car, the noise of which probably accounted for his not hearing the signal.

This was all the testimony in the case. The Court, after argument of counsel, ruled as follows:

"There are a good many different questions raised by this case, and one with regard to the right of way. I have had that question before me in years gone by, and I have not changed the view that I then formed of it. 'The right of way' does not mean that nobody can cross the track in front of the *track in front of the* car—not at all. It means that a man cannot hinder a car by driving in front of it, or driving in such a way as to obstruct the way along the right of way. But a man that gets to the track first has just as much a right to cross that track as the car has if it gets there first; but if the two are there at the same time, the car has the right of way. But I do not understand that to mean that everybody has to stand back and wait. If a vehicle is within twenty feet of the track and the car within a hundred feet of it, I do not think the vehicle has to stand by and let the car pass first. That is not the meaning of it, in my judgment.

"It has been the custom, during the forty-five years that I have lived in Washington (and I never have seen it departed from)
9 for a funeral to have the right of way over everything and everybody; and the motorman on the first car evidently so

understood it, because, according to his testimony, he did his best to give the funeral the right of way which, if not law, is the custom, and is a custom of such long standing that it becomes virtually law. It has always been the custom—and when I first went on the bench there was a special law giving funerals the right of way. I do not know what has become of that law now. There was a special law; but, no matter what has become of that, it is a fact that everybody takes it for granted that no one will pass through a funeral. The proper respect which we have to a funeral, to the mourners, to the circumstances, would lead everybody, a street-car motorman as well as everybody else, to stop and to give it the right of way. It always has been the custom, and I never have known it to be varied from, to give a funeral the right of way.

"With regard to this defendant not being able to see: There was a curve. This motorman, if he is accustomed to going up and down there, knows that there is quite a travel coming across from the east to the west and from the west to the east around that circle; and he knows, or must know, that there he must exercise more caution than if it was a straight track because of that fact; and he was put upon his notice. It was his duty to know and to see, and to so conduct his car that there would be no danger of a collision. I do not think he did it. There is proof positive that the motorman on the front car did his part; that he rang the bell; that he put on his brake, recognizing the custom with regard to funerals. The defend-
10 ant, the motorman of the second car, through some means or other paid no attention. It was his duty to see and to know, as he had the full power, that others had the right to cross there—to know that there was liability of an accident if he did not use extra care; and it does not seem to me that he did. It seems to me that he did not use the care that a man put in that position, the responsible position of a motorman on a car, was required by the law to use.

"I must, therefore, hold that this case is made out, and that the collision occurred through his carelessness, his want of care, and the improper conduct of his business as the motorman of that car."

To which said ruling of the Court the defendant by his counsel excepted, which said exception was duly noted by the Court on his minutes.

And thereupon the defendant, by his counsel, further excepted specially to the language of the Court in said ruling, as follows:

"It has been the custom, during the forty-five years that I have lived in Washington (and I never have seen it departed from) for a funeral to have the right of way over everything and everybody; and the motorman on the first car evidently so understood it, because, according to his testimony, he did his best to give the funeral the right of way which, if not law, is the custom, and is a custom of such long standing that it becomes virtually law."

Which said exception was duly noted by the Court on his minutes.

And thereupon the defendant, by his counsel, gave notice in
11 open court of his intention to apply to a Justice of the Court of Appeals of the District of Columbia for a writ of error.

The defendant, by his said counsel, therefore prays the Court to settle, sign and seal this, his bill of exceptions, which is accordingly done now for then, this 11th day of November A. D. 1908.

(Signed) I. G. KIMBALL,
Judge Police Court.

12 (*Copy of Docket Entries.*)

In the Police Court of the District of Columbia, November Term, A. D. 1908.

No. 329,300.

DISTRICT OF COLUMBIA
vs.
HARRY T. HALL.

Information for Violation of Police Regulations.

Nov. 9, 1908.—Plea to the jurisdiction of the Court and motion to quash information filed, argued and overruled.

Defendant arraigned. Plea: Not guilty. Judgment: Guilty. Sentence: To pay a fine of forty dollars, and, in default, to be committed to the Workhouse for the term of sixty days.

Exceptions taken to the rulings of the Court on matters of law and notice given by the defendant in open Court at the time of the several rulings of his intention to apply to a Justice of the Court of Appeals of the District of Columbia for a writ of error.

Recognizance in the sum of $100 entered into on writ of error to the Court of Appeals of the District of Columbia upon the condition that in the event of the denial of the application for a writ of error, the defendant will, within five days next after the expiration of ten days, appear in the Police Court and abide by and perform its judgment, and that in the event of the granting of such writ of error, the defendant will appear in the Court of Appeals of the District of Columbia and abide by and perform its judgment in the premises.

DAVID S. CARL, *Surety.*

Nov. 11, 1908.—Bill of exceptions filed, settled, signed and sealed.

Nov. 17, 1908.—Writ of error received from the Court of Appeals of the District of Columbia.

13 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, N. C. Harper, Deputy Clerk of the Police Court of the District of Columbia, acting in the absence of the Clerk, do hereby certify *that* the foregoing pages, numbered from 1 to 12 inclusive, to be true copies of originals in cause No. 329300 wherein the District of Co-

lumbia is plaintiff and Harry T. Hall defendant, as the same remain upon the files and records of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, — the City of Washington, in said District, this 24th day November, A. D. 1908.

[Seal Police Court of District of Columbia.]

N. C. HARPER,
Deputy Clerk Police Court, Dist. of Columbia.

14 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable I. G. Kimball, Judge of the Police Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between District of Columbia, Plaintiff, and Harry T. Hall, Defendant, a manifest error hath happened, to the great damage of the said Defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Seth Shepard, Chief Justice of the said Court of Appeals, the 17th day of November, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

[Endorsed:] Filed Nov. 17, 1908. F. A. Sebring, Clerk Police Court, D. C.

Endorsed on cover: District of Columbia police court. No. 1968. Harry T. Hall, plaintiff in error, *vs.* District of Columbia. Court of Appeals, District of Columbia. Filed Nov. 24, 1908. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1909.

No. 1968. No. 5, Special Calendar.

HARRY T. HALL, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

BRIEF OF APPELLANT.

A.

Concise Statement of Facts.

The appellant, on the 9th of November, 1908, in the District of Columbia branch of the Police Court in this city, before the honorable Ivory G. Kimball, was charged as a motorman operating a certain street-car, with colliding with a hearse, which formed a part of a funeral procession, at Thomas Circle in the city of Washington, in violation of section 10, article 10, of the Police Regulations of the District of Columbia, which is as follows:

> "No person shall ride a bicycle, horse, or horse-drawn vehicle, or propel a horseless vehicle so as to collide with any other person, bicycle, horse, horse-drawn or horseless vehicle, and the rider, driver, or operator of such bicycle, horse or vehicle shall make way for pedestrians at street crossings."

The appellant entered a plea to the jurisdiction of the court and also moved that the information be quashed.

The plea was not sustained and the motion was overruled by the court. The appellant was convicted and sentenced to pay a fine; whereupon a writ of error was sued out to this court. It was also urged upon argument on the merits of the case, that by virtue of section 15 of article 10 of the Police Regulations, the street-car in question had the right of way over the vehicle with which it collided and the refusal of the court to so hold formed the basis of one of the exceptions as will hereinafter appear (Rec., p. 6). The language of said section 15 so far as it applies to this matter is as follows:

> "Street-cars within the District of Columbia shall have the right of way upon their respective tracks, except as to vehicles of the fire, police, water and health departments and hospital ambulances, and as otherwise provided; and no person shall obstruct or delay the movement thereof, at the lawful rate of speed hereinafter designated. . . ."

It appeared by the uncontroverted evidence in the case that the car operated by the appellant was in the rear of, coupled to and was pushing a disabled or "dead" car and was not running at an illegal or unusual speed at the time of the collision (Rec., pp. 4–5). It also appeared that the appellant by reason of the dead car in front did not and could not see the hearse until after it was struck.

It further appeared by the uncontroverted evidence in the case that there was nothing to prevent the driver of the hearse from seeing the street-car approaching the point of the collision as he was approaching the track and before driving on the track and when he was from 25 to 30 feet from the track. It further appeared that the appellant who was operating the motor car in the

rear heard no signal to stop, such as the motorman in front testified that he gave.

In passing upon the case the court, among other things, ruled in brief:

First. That section 10, article 10, of the Police Regulations as hereinbefore quoted applied to street-cars as well as other vehicles.

Second. That the right of way given to the cars of the Capital Traction Company by its charter and also by section 15 of article 10 of the Police Regulations as above quoted, had no bearing upon the case at bar and that pedestrians are not bound to make way for the street-cars.

Third. That in spite of said statutes and Police Regulations by a custom of long standing in the District of Columbia, funerals have the right of way over everything and everybody, including street-cars.

Fourth. That section 16 of the act of Congress approved May 23, 1908, conferring certain powers upon the Interstate Commerce Commission with respect to the regulation of street railways in the District of Columbia did not confer upon said Interstate Commerce Commission power to make regulations to prevent and to punish for collisions between street-cars and other vehicles in the streets such as the Police Regulation in question in this case.

The appellant was thereupon convicted of the charge of colliding and this appeal was taken.

B.

Argument on the Law.

1. The first exception taken by the appellant was to the action of the court in overruling the motion to quash the information. This motion and the plea to the jurisdiction of the court were based upon the following

theories: (1) *That the regulation in question was never intended to apply to the operation of street-cars.*

Street-cars are not mentioned either specifically or by inference in the regulation. The only words of the regulation which could, by any construction, however strained, be said to apply to or include street-cars would be the words, "horseless vehicles." But this is hardly a reasonable construction in view of the fact that the Commissioners have undertaken to prescribe and to describe in detail just what kinds of vehicles would be affected by the regulation. To be sure a street-car is a horseless vehicle in the sense that it is not drawn or propelled by a horse, but so, for that matter, is a balloon or airship; so, also, is a baby carriage. Manifestly the term horseless vehicle was used in this regulation by the Commissioners to describe a self-propelled vehicle such as are now known as automobiles. The definition of the term as given by the Standard Dictionary in the addenda thereto is as follows: "**Horseless**—not possessing, using or requiring a horse; usually in such phrases as horseless carriage (an automobile), or the like."

These considerations are strongly emphasized by the history of this section of the Police Regulations which is apparent upon their very face. In the edition of said regulations dated July 24, 1906, which is the last complete publication thereof (the amended and present form of the section being evidenced only by a printed slip inserted at the proper page), the language of section 10 as originally enforced was as follows: "No horse or vehicle shall be riden or driven so as to collide with any other horse or vehicle or with any person, and the driver or rider of such horse or vehicle shall make way for pedestrians at street crossings." It certainly would never be contended that such language as this in the original draft could be or was ever intended to be applied to the operations of street-cars on fixed tracks. In fact, one

can not read the entire article 10 of the regulations without being thoroughly convinced that the word "vehicle," used time after time, is in the minds of the Commissioners a term intended to describe carriages, wagons, and their like, which are free to go where they will in the streets, as distinguished from street-cars. Without exception in this article and throughout the Police Regulations whenever regulations have been made affecting street-cars, the term "street-cars" has been used, and we submit most naturally for the reason that it is a well-known, familar, and commonly accepted designation of a particular class of public vehicles, and it is inconceivable that, when the Commissioners of the District of Columbia thought it necessary for whatever purpose to amend section 10 by differentiating the term "vehicle" into its component parts, they should have used terms as "bicycle," "horse-drawn vehicle," and "horseless vehicle," and have failed to specify street-cars had they meant to include them. Street-cars are so obviously in a different class as regards there operation, from other vehicles, that it certainly can not be said as a general proposition that such regulations as would be necessary and proper with respect to the control of such other vehicles would be necessary and proper with respect to street-cars.

The amendment to the regulation was officially promulgated by publication on November 11, 1907, which is very significant when it is considered that automobiles or horseless vehicles are an extremely modern invention and have only come into common use in the streets within the past few years, whereas street-cars have been in common use from a relatively ancient date. It is only within the last two, or at most three, years that the use of automobiles in the streets has become so common as to call for the enactment of special regulations, and it was obviously for the purpose of regulating such vehicles that the amendment was made.

Is not this construction of the regulation conclusively established by consideration of the last two lines of the regulation itself which provides that "the rider, driver, or operator of such . . . vehicle shall make way for pedestrians at street crossings?" Is it conceivable that the Commissioners of the District of Columbia intended to enact that the public street-car service in the city of Washington should be subservient to the casual pedestrian at street crossings? Is it conceivable that they intended to say that a large, cumbrous, heavy, and rapidly-moving street-car, carrying scores of passengers and confined to fixed rails should make way for every person on foot undertaking to cross the streets at street crossings; that the operator of such car should slow down or stop his public conveyance upon seeing a pedestrian approaching the track, for the mere purpose of giving that pedestrian a preferential right of way? Such a construction is so unreasonable that its mere statement is sufficient to eliminate it from all consideration. And if the mere statement of the idea is not sufficient, it may be said that the Commissioners themselves have taken pains as has been previously pointed out, to specially enact by section 15 of the same article that "street-cars . . . shall have the right of way upon their respective tracks" except as to emergency vehicles.

Wheeler *vs.* Boone, 108 Iowa, 235; 44 L. R. A., 821.

Robinson *vs.* Met. Ry. Co., 92 N. Y. S., 1010.

Wash. El. Vehicle Tr. Co. *vs.* D. C., 19 App. D. C. 462.

Whitaker *vs.* Eighth Ave. Ry. Co., 51 N. Y., 295, 298.

5 Words & Phrases, 4614, "Motor Vehicles."

B. & O. R. R. *vs.* D. C., 10 App. D. C., 111, 125; 25 W. L. R., 118, 121.

Bridge Co. *vs.* R. R. Co., 114 Pa. St., 484.

Duckwall *vs.* New Albany, 25 Ind., 283, 286.

2. This brings us to a consideration of the general question of the right of way of street-cars with respect to other vehicles and pedestrians in the streets. This question is fully discussed in a brief or compilation entitled "Legal propositions concerning collisions between the cars of the Capital Traction Comnany and pedestrians or vehicles" at pages 10 to 26 thereof, which compilation is herewith respectfully submitted for reference.

3. With respect to the proposition advanced by the trial judge, that by custom of long standing, funerals in the District of Columbia have the right of way over everything and everybody, it might be said to begin with, that if such is the case, the customary violation of any statute, whether criminal or otherwise, would operate as a repeal of that statute. We will hardly be expected to take the time of the court to discuss that proposition. Suffice it to say, that if, in the absence of statute or regulation, the custom ever had grown up or was ever in existence in the District of Columbia conceding the right of way of funerals over street-cars, such custom has been superceded and whatever effect it may ever had have had as law has been expressly done away with and repealed by the enactment of section 15 of Article 10 of the Police Regulations as well as the act or acts of Congress constituting the charter or charters of the various street railways. We doubt whether any such custom ever existed as a matter of right.

Basey *vs.* Gallagher, 20 Wall., 670; 22 L. Ed., 452, 455.

4. The extent and nature of the powers conferred upon the Interstate Commerce Commission by the recent act of Congress of May 23, 1908, is the question of most importance raised by this appeal. It is, we might say, of

extreme importance. Unquestionably Congress intended to and did delegate to the Interstate Commerce Commission a certain regulatory supervision over the street railways of the District of Columbia. Whether those delegated powers are broad and general or narrow and restricted is the first question which must be decided. Did Congress intend to constitute the Interstate Commerce Commission a public service commission for the District of Columbia with jurisdiction over the street railways, with plenary power to regulate their operation in every respect consistent with their charters and law, thereby removing the railways from the jurisdiction and control of the District Commissioners in every respect? Or did it intend to so narrowly restrict the regulatory jurisdiction of the Interstate Commerce Commission over the roads as to limit their power to the enforcement of such definite and special requirements, in the way of service to their patrons, as Congress may have had specially in mind at the time of the passage of the act? The language of sections 16 and 17 of the act must be analyzed with considerable care. That of section 16 is considerably involved, but it would seem that upon careful analysis it is not equivocal or ambiguous. Certainly by the use of the expression "every street railway company or corporation owning, controlling, leasing, or operating one or more of said railroads within the District of Columbia," was intended to embrace all the street railways in the District and they are by the further language of the act commanded to do a large number of things, it would seem everything in fact, which a street railroad company can ordinarily be called upon to do, namely, to "supply and operate a sufficient number of cars, clean, sanitary, in good repair, with proper and safe power, equipment, appliances, and service, comfortable and convenient, and so operate the

same as to give expeditious passage, not to exceed 15 miles an hour in the city limits or 20 miles an hour in the suburbs, to all persons desirous of the use of said cars without crowding said cars." Such expressions as "proper and safe power, equipment, appliances, and service" are certainly about as broad and comprehensive as language could make them.

Definitions of the word "service" in this connection, as given in the Standard Dictionary, are as follows:

> "The official duty or work required of one; hence, also any system or organization instituted for the accomplishment of such duty; as military and naval service. . . .
>
> "Any agency for the accomplishment of some constantly needed work, or the supply of some general and recurrent demand; as a good omnibus service, a poor telegraph service."

It would seem, therefore, that Congress had embraced in this phrase not only the physical property and appliances, such as cars, motors, power-houses, tracks, switches, conduits, and the like, but also the conductors and motormen and other employees and their duties, and the general relations of said railways to the public. It would seem that Congress had in mind to compel the said railways to give to the public the best possible rapid transit service consistent with safety and the rights of the companies as limited by charter and law.

It would seem to be incompatible with this purpose to divide the responsibility and the authority for enforcing it between two different, independent, and distinct commissions or executive agencies. If the Interstate Commerce Commission is to enforce the will of Congress in this respect, it must have plenary and exclusive power to do so, and this it would seem was unquestionably given by the next following sentence: "The Interstate

Commerce Commission is hereby given power to require and compel obedience to all of the provisions of this section, etc." While any powers which the Commissioners of the District of Columbia may have had by way of control over the street railways for the purpose of providing safe and efficient rapid transit, such as is provided by this act, are not *expressly* repealed, it certainly can not be gainsaid that the effect of this act is to supercede and repeal any such authority. For not only is it well accepted that an act of the legislature inconsistent with former acts necessarily repeals such acts, but where executive, legislative, or judicial authority is imposed upon or entrusted to any given individual or tribunal, such authority and jurisdiction, in the absence of any expressed intention to the contrary, must be presumed to be exclusive.

D. C. *vs.* Hutton, 143 U. S., 18; 12 Sup. Ct. Rep., 369; 36 L. ed., 60.

Appeal of C. Ry. & El. Co., 67 Conn., 199, 216.

It would naturally follow therefore that any regulation made or attempted to be made by the District Commissioners or any authority other than the Interstate Commerce Commission which would tend to impede, hamper, or limit the "expeditious passage not to exceed 15 miles per hour in the city limits or 20 miles per hour in the suburbs" by the street-cars of this city would be *ultra vires* as being in conflict with the authority and the duty imposed upon the Interstate Commerce Commission. It certainly could not be contended that in the face of this statute, and the regulations of the Interstate Commerce Commission promulgated thereunder, that the District Commissioners could regulate the speed of cars. So obvious is this that they have in fact, abandoned attempts to do so in any direct manner and the present practice is that prosecutions for speed violations are at

present brought in the name of the Interstate Commerce Commission.

Suppose now that the District Commissioner shall undertake to enforce provisions of their own, requiring street-cars to stop at certain given points or street crossings; could their authority in such a matter be sustained? Would not the effect of such a regulation be palpably to curtail "expeditious passage" of street-cars and therefore an infringement of the rights of the Interstate Commerce Commission; an infringement of their authority? Such regulation could only be for the purpose of enforcing either "proper" or "safe" "service" and the Interstate Commerce Commission is expressly given authority to do that very thing.

If, by any stretch, the Police Regulation here in question against colliding can be held to apply to street-cars, then it could have but one object, the punishment of the servants of the company operating the car for failing to give safe service, and such a regulation would be void for the same reasons.

Again, suppose the District Commissioners should undertake to enforce a regulation requiring street-cars to carry headlights under certain conditions. Could their assumption of authority in this respect be supported? Such a regulation they in fact had and did enforce prior to the passage of this act, but we take it that they make no claim now to the possession of such authority. The Interstate Commerce Commission has itself reenacted this and other regulations in almost, if not quite, the identical language of the former regulations of the District Commissioners on the subject, and this regulation of the Interstate Commerce Commission is being enforced by that commission without any question by the District Commissioners as to the authority of the Interstate Commerce Commission in the premises. Is such a regulation requiring a headlight for any other purpose than

to prevent collisions with vehicles and pedestrians in the street, and if so what is that purpose? The same also may be said with respect to a number of other regulations of the Interstate Commerce Commission, which undertake to regulate matters which were formerly regulated by the District Commissioners. As, for instance, the sounding of a gong by the motorman under certain conditions, the equipment of all cars with safety fenders and wheel guards, the reduced speed at crossings, etc., etc.

So far we have discussed only section 16 of the recent act of Congress and we have seen that the Interstate Commerce Commission were expressly given power to compel obedience to all of the provisions of this "section." But it is worthy of notice that section 17 of the act has given them much broader powers even than this, for it provides that:

> "Prosecutions for violations for any of the provisions of this *act* shall be on information of the interstate Commerce Commission, filed, etc."

In other words any violation of any provision of any of the 16 prior sections of the act which provide for the new construction of railways in the streets, the condemnation of property, the taking of public property for street railway purposes, prosecutions for unlawful use of transfer tickets and numberless other provisions shall be on information of the Interstate Commerce Commission.

In conclusion it would seem that the only reasonable construction to be put upon this act of Congress, is, that it intended to and did place in one expert, experienced and responsible body, the Interstate Commerce Commission, full and complete authority and jurisdiction over the operations of the street railways in the

District of Columbia, so far as such authority did not infringe the charter rights of the companies or were not in violation of the general law.

It affords us pleasure to say that in the preparation of this brief we have availed ourselves of work done by Mr. Edwin Allan Swingle in relation to the questions involved.

Respectfully submitted.

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